



IN THE
Supreme Court of the United States

No. 78-1848

UNITED STATES, *ex rel.*
JULIUS PETROFSKY,
Petitioner,

vs.

VAN COTT, BAGLEY, CORNWALL & McCARTHY,
et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether Petitioner's appeal to the United States Court of Appeals for the Tenth Circuit, filed 60 days after entry of the District Court's Order, was timely filed.

STATEMENT OF THE CASE

On February 16, 1977, Petitioner Julius Petrofsky, acting *pro se*, filed suit in the United States District Court for the District of Utah against Respondents, seeking damages under the False Claims Act, 31 U.S.C. §232. Respondents are a Salt Lake City, Utah law firm of more than 30 attorneys and named individual members of the firm.

The False Claims Act allows individuals to sue in the name of the United States to recover fraudulent claims made against the United States. Petrofsky's Complaint in the District Court alleged fraud against the United States on the part of Respondents which allegedly occurred at a time when Respondents represented the claim of a plaintiff against the United States in *Murray v. United States*, 327 F.Supp. 835 (D. Ut. 1971). The late Willis W. Ritter, former Chief Judge of the United States District Court for the District of Utah, presided over *Murray*. The plaintiff in *Murray* was successful and awarded damages. The verdict was upheld on appeal. *United States v. Murray*, 463 F.2d 208 (10th Cir. 1972).

According to Petrofsky, Respondents committed fraud by not disclosing to the United States Attorney that they had previously represented American Gypsum Trust of which Judge Ritter had been a trustee in a suit in the district court of Sevier County, Utah. Petrofsky's reasoning, apparently, is that Respondents prevented the United States Attorney from filing a motion to disqualify Judge Ritter in *Murray*, and that if such motion had been made, Judge Ritter would have been disqualified and another judge would have decided the case differently than Judge Ritter or at least awarded lesser damages.

Pursuant to the terms of the False Claims Act, the Government must either join or withdraw from the suit within 60 days after suit is commenced. 31 U.S.C. §232 (c). If the Government joins, it controls the litigation. If it withdraws, the person bringing the action may proceed individually. *Id.*

On April 25, 1977, the United States, by letter, expressly declined to join in Petrofsky's case. Thereafter, Petrofsky proceeded individually.

Respondents moved to dismiss Petrofsky's suit for failure to state a claim upon which relief could be granted. More specifically, Respondents asserted the allegations of the Complaint were insufficient to state a claim for fraud under the Act or any other theory and, furthermore, that Petrofsky's action was frivolous, being designed not to assert a legitimate claim but rather to attempt to use the Federal Courts to harass and frustrate reputable lawyers and a Federal judge.

Respondents' motion was granted and entered by the District Court on March 8, 1978. Sixty days later, on May 8, 1978, Petrofsky appealed the Order of Dismissal to the Tenth Circuit Court of Appeals.

On December 21, 1978, the Circuit Court, on its own motion and after requesting briefs on the issue, dismissed Petrofsky's appeal for failure to timely file. Rule 4(a) of the Federal Rules of Appellate Procedure requires an appeal to be brought within 30 days unless "the United States or an officer or agency thereof is a party" in which case the time limit is extended to 60 days.

Petrofsky argued to the court below that the time for appeal is 60 days because the case was brought in the name of the United States. The court specifically rejected Petrofsky's argument, and, in doing so, emphasized that the Government had timely and clearly withdrawn from any

participation in Petrofsky's suit and therefore was not a party to the action. Hence, the court found the 30-day requirement of Appellate Rule 4 (a) controlling and held Petrofsky's appeal was not in time. *United States, ex rel. Julius Petrofsky v. Van Cott, Bagley, Cornwall, & McCarthy*, 588 F.2d 1327 (10th Cir. 1978).

ARGUMENT

In his Petition for a Writ of Certiorari, Petrofsky fails to advance any reason why the issue presented in this case should be reviewed by this Court. Petrofsky does not suggest that this case qualifies for review under any of the criteria listed in Rule 19 of the Revised Rules of the Supreme Court of the United States.

Aside from one paragraph at the close of Petrofsky's Petition, wherein he seems to suggest that review should be had because of the "importance" of the issue, Petrofsky's Petition offers no reason whatever why this Court should exercise its discretion to review this case. Rather, the Petition is devoted to arguments why Petrofsky feels the Circuit Court of Appeals should have decided in his favor.

A review of the Circuit Court's opinion shows a holding harmonious with legal precedent and with the purpose, meaning and intent of Rule 4 (a) of the Federal Rules of Appellate Procedure.

A. THERE IS NO SPECIAL OR IMPORTANT REASON WHY THIS COURT SHOULD REVIEW THE LOWER COURT'S DECISION.

Petrofsky's Petition is devoid of grounds to support his request that this Court grant review. The opinion of

the court below is not in conflict with the decisions of another Court of Appeals or of the United States Supreme Court on the same matter. Of the numerous cases cited in Petrofsky's Petition, not one is concerned with the question at issue in this action.

This case does not present an important issue of Federal law which should be settled by this Court. Petrofsky's suit is based on a provision of an Act which, in the words of the Tenth Circuit, "was enacted during the Civil War" and "has received little attention in modern history." 588 F.2d 1329 (10th Cir. 1978). See also *United States, ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943), where this Court said:

[O]ne of the chief purposes of the Act, which was itself first passed in war time, was to stimulate action to protect the government against war frauds.

There being no grounds for granting review, Petrofsky's Petition should be denied.

B. THE COURT BELOW CORRECTLY APPLIED APPELLATE RULE 4 (a). THE UNITED STATES, HAVING EXPRESSLY WITHDRAWN, WAS NOT A PARTY TO THE SUIT.

The Circuit Court's review and analysis of whether the Government was a party to this suit within the meaning and purpose of Rule 4 (a) of the Federal Rules of Appellate Procedure was harmonious with the purpose and intent of the rule itself and the False Claims Act pursuant to which the suit was commenced.

With respect to provisions of the Act requiring the Government to join or withdraw from the suit, the Circuit Court stated the following:

The statute gives the Government the option to prosecute the case itself, or withdraw. Here the Government withdrew. Petrofsky knew this, and so did the Defendant. It was clear at that time the United States would not participate in the suit and that proceeding in its name *was merely a statutory formality*. 588 F.2d at 1329. (Emphasis added).

In its opinion, the lower court makes clear its awareness of and adherence to the need for a broad and open reading of Appellate Rule 4 (a) "to assure innocent parties [will] not be prejudiced by too strict a reading." *Id.* It was after full recognition of this open reading policy and a rather detailed discussion of prior decisions of its own and other Circuit Courts of Appeal regarding when the United States is and is not considered a party under Rule 4 (a), that the lower court specifically decided in this case the appeal was not timely filed. The court stated:

All parties were aware the Government disclaimed any participation in the suit and there are no other circumstances which indicate a need for more than the usual 30 days to make the appeal. *Id.*

Petrofsky was given timely and unambiguous notice from the Government that it did not wish to participate in Petrofsky's suit. For almost a full year prior to entry of the District Court's Order of Dismissal, Petrofsky was in sole charge of prosecuting his action. The Government had withdrawn. There existed no continuing governmental participation of any type.

The situation was far different from cases arising under the Miller Act, 40 U.S.C. §270, *et seq.*, where the Government is considered a party under Rule 4 (a) even though the suit is privately brought and prosecuted. In Miller Act cases, the underlying dispute is entirely based on contracts to which the Government is a principal party. Therefore, the Government is considered to have a continuing governmental interest in the suits. *United States Fidelity and Guaranty Co. v. United States*, 204 U.S. 349, 356 (1907); *United States v. Douglas Constr. Co. Inc.*, 531 F.2d 478 (10th Cir. 1976).

As the Circuit Court noted, "[m]ore time to appeal is needed when the United States is a party because the government must process its decisions through internal channels." Under the circumstances of this case, however, the Government was not a party. There was no basis in fact or law for application of Rule 4 (a)'s 60-day time allowance.

CONCLUSION

Petrofsky's appeal was untimely. There is no special or important reason why this Court should grant review. The Petition for Certiorari should be denied.

Respectfully Submitted,

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